

ANGEL MARTINEZ
Claimant

THE COLEMAN COMPANY
Respondent

COLEMAN COMPANIES
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD

ISSUES

Claimant appeals from a decision by the Administrative Law Judge modifying a previous award. The Administrative Law Judge reviewed the previous award based upon new evidence presented and increased the award from the original thirty-three and one-third percent (33.33%) to fifty percent (50%) permanent partial general disability. Although claimant listed other issues in his Application for Review, at the time of oral argument the parties distilled the issues to the following:

- (1) What is the nature and extent of claimant's permanent impairment?
- (2) Should the change in the award be made retroactive to March 1, 1990?

Most of the other issues listed by claimant in his Application for Review stem from uncertainty about what the Administrative Law Judge intended in the original award. The parties note that the text of the original award, specifically Finding No. 4, suggested the claimant is entitled to temporary total disability benefits previously awarded. However, the subsequent "Award" section does not include temporary total disability benefits. As a part of the review and modification proceedings, the Administrative Law Judge ordered respondent to pay temporary total disability benefits for a period both before and after claimant's surgery. From a review of the record, the Appeals Board finds claimant should be entitled to, and the Administrative Law Judge undoubtedly intended, to award those temporary total disability benefits already paid.

The Appeals Board notes, however, temporary total benefits were ordered at an incorrect rate which assumed claimant was entitled to the maximum of \$247.00 per week for the period in question. As the Administrative Law Judge notes in her Award, claimant's average weekly wage was modified on appeal to the District Court. The average weekly wage there determined to be \$361.89 and the resulting temporary total disability rate should be \$241.27 per week. In this Order the benefits are modified accordingly.

Respondent next argued that the Administrative Law Judge erred by not requiring the Kansas Workers Compensation Fund to reimburse respondent for the temporary total benefits paid. This argument assumes the award does not include the temporary total disability benefits paid and becomes moot in light of the above holding.

Claimant also points to calculation errors in the Award. The Appeals Board notes there was an error in the number of weeks used for the modified Award. Accounting for the temporary total benefits also changes the calculation and the Appeals Board has recalculated the award as reflected in the "Award" section of this Order.

Claimant also contended the Administrative Law Judge erred by limiting the award of unauthorized medical costs. The award appears to limit the unauthorized medical to expenses incurred before claimant became temporarily totally disabled. At the time of oral argument, respondent agreed that claimant would be entitled to the full \$350.00 in unauthorized medical expense if, as claimant asserted, the \$350.00 was not paid as a part of the original proceedings. The Appeals Board does, therefore, award the full \$350.00 in unauthorized medical expenses if they were not paid as a part of the original claim.

Claimant next asserts that the Administrative Law Judge erred when she did not find that claimant's functional impairment had increased. At the time of oral argument, claimant acknowledged that a finding relating to change in the functional impairment is not essential

if the award is based upon work disability. As further explained below, the Appeals Board does conclude that the award should be based upon work disability. The Appeals Board also finds claimant did experience an increase in his functional impairment. It is unnecessary to decide the exact amount of that increase because the award is based upon the resulting increase in work disability.

Finally, claimant originally alleged an error in the wage calculation. Claimant withdrew this issue at the time of oral argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments, the Appeals Board finds:

- (1) Claimant's award should be increased from thirty-three and one-third percent (33.33%) to fifty percent (50%) work disability.

Claimant sustained an injury on February 9, 1987, while lifting an air conditioning unit in the course of his work for respondent. On February 15, 1988, the Administrative Law Judge issued an award finding claimant had a thirty-three and one-third percent (33.33%) permanent partial disability. The Administrative Law Judge based the finding upon the definition of disability found in *Ploutz v. Ell-Kan Co.*, 234 Kan. 953, 676 P.2d 753 (1984). The Administrative Law Judge therefore measured the work disability as a percentage of the worker's ability to engage in work of the same type and character as he was performing at the time of the injury. At the time of the injury, claimant's work included a variety of duties. He welded, packaged air conditioning units, drove a forklift, and cleaned air conditioning units. As part of the original award, the Administrative Law Judge found that claimant could still weld, package, and drive a forklift. Since the time of that award, claimant has undergone a discectomy with fusion. The Appeals Board finds that claimant now has additional restrictions which will further limit his ability to perform the work he performed for respondent. Although his lifting restrictions remain essentially the same, claimant is now restricted to occasional bending and occasional overhead reaching. The Appeals Board finds that these restrictions prohibit claimant from performing the duties of a welder and, accordingly, his work disability has increased. The Appeals Board agrees that claimant remains capable of performing some of the duties associated with forklift driving and touch-up painting. The bending restrictions would preclude some of his duties as a packager. Although the Appeals Board disagrees with claimant's contention that he is now permanently and totally disabled, the Appeals Board does agree that his disability has increased and finds that he has a fifty percent (50%) work disability.

- (2) The modification in the award should be made retroactive to March 1, 1990.

Claimant applied for review and modification on June 7, 1990. The applicable statute, K.S.A. 44-528a, provides that the modification is to be effective on the date the increase or diminishment of disability actually occurred but in no event more than six (6) months prior to the date of the Application for Review and Modification. Claimant testified that he experienced a significant increase in his symptoms on or about March 1, 1990. The Appeals Board finds March 1, 1990, to be the date claimant experienced an increase in disability. Since this date is less than six (6) months prior to the application, the award should be retroactive to March 1, 1990.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 28, 1994, should be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Angel Martinez, and against the respondent, Coleman Company, Inc., and the insurance carrier, Coleman Company Self-Insured, for an accidental injury sustained on February 9, 1987.

Claimant is entitled to \$350.00 in unauthorized medical expense if not already paid as part of the original award.

As of March 1, 1990, the date claimant's disability increased, 159.57 weeks would have been paid on the Award of February 15, 1988, for an accident on February 9, 1987, including the 11.71 weeks of temporary total disability already paid on the first award. This would leave 255.43 weeks of compensation due to the claimant.

Claimant is entitled to 60.14 weeks of temporary total disability benefits at the rate of \$241.27 per week for the period January 31, 1991 to March 26, 1992. When the 60.14 weeks of temporary total benefits are accounted for, there remains 195.29 weeks to be paid at the adjusted rate for 50% permanent partial general disability.

Claimant is, therefore, entitled to 60.14 weeks of temporary total disability compensation at \$241.27 per week for the period January 31, 1991 to March 26, 1992, or \$14,509.98, and 195.29 weeks of permanent partial general disability at \$120.64 per week or \$23,559.79, for a total Award on Review and Modification of \$38,069.77.

As of November 30, 1994, there would be due and owing 60.14 weeks of temporary total disability compensation at \$241.27 per week or \$14,509.98 plus 187.86 weeks of permanent partial disability compensation at \$120.64 per week or \$22,663.43 for a total due and owing of \$37,173.41 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$896.36 shall be paid at the rate of \$120.64 per week for 7.43 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Vaughn Burkholder, Wichita, KS
Cinda Smith, Hutchinson, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director